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In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILADELPHIA ELECTRIC CO., PETITIONER

v.

BLACK GRIEVANCE COMMITTEE, ET AL.

INDEPENDENT GROUP ASSOCIATION, PETITIONER

v.

BLACK GRIEVANCE COMMITTEE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner Philadelphia Electric Co. (PECO) employs approximately 10,000 employees. Petitioner Independent Group Association (IGA) represents between 4200 and 4600 of PECO's employees and has dealt with PECO on a noncontractual basis on behalf of its members for more than 40 years. The IGA has never voluntarily been recognized by PECO or certified by the Board as the exclusive bargaining representative of PECO's employees; however, IGA representatives meet monthly with PECO personnel

representatives to discuss wages, hours, and working conditions, and appeals of individual grievances of its members. The IGA is acknowledged in PECO's employee handbook as performing these functions. PECO has also allowed the IGA to use company bulletin boards and parking lots, and has implemented a dues checkoff procedure for IGA members. Pet. App. A19-A21.[1]

The Black Grievance Committee (BGC), which represents about 200-300 of PECO's employees, was formed in 1968 to assist minority employees on employment discrimination issues and in processing grievances. Its primary purpose still is to eliminate perceived discriminatory practices in the workplace. PECO representatives have met with BGC representatives on various matters concerning minority employees; although PECO has been willing to discuss wages and other working conditions with the BGC, the BGC has advised PECO that it is not interested in working with PECO on such matters. The BGC also has not sought the use of the company bulletin boards or parking lot, reference in the employee handbook, or dues checkoff. Pet. App. A25-A26, A44-A45. BGC objects only to PECO's refusal to meet with BGC representatives to discuss appeals of individual grievances in the same manner as under the IGA procedure, and to acknowledge the representative status of BGC officials who accompany employees to grievance meetings. Pet. App. A22-A23.[2]

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[1]"Pet. App." refers to the appendix to the petition filed by Philadelphia Electric Co., No. 84-1633.

[2]Under PECO's grievance procedure, which is available to all employees, individual employees first discuss their grievance with their immediate supervisor and, failing resolution at that step, then discuss it with successively higher levels of supervision. If the grievance is not resolved through those supervisory channels, an employee may appeal to the personnel department, and a final, nonarbitrable decision is rendered by PECO's vice president for personnel. At the appeal stage,

Based on this differing treatment of the IGA and BGC in the processing of employee grievances, a BGC representative filed an unfair labor practice charge alleging that PECO violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). The Board's General Counsel issued a complaint on the charge. Pet. App. A5-A6.

2. The Board, substantially adopting the findings and conclusions of the administrative law judge (ALJ), held that PECO's preferential treatment of the IGA did not violate Section 8(a)(1) of the Act, and accordingly dismissed the complaint. The Board stated that "[n]either the IGA [n]or the BGC is an exclusive representative of [PECO's] employees within the meaning of Section 9(a) of the Act [, 29 U.S.C. 159(a), and] favoritism or partiality to the IGA cannot violate the rights of the BGC and its adherents where neither organization seeks Section 9(a) status" (Pet. App. A41). The Board acknowledged, as the ALJ had concluded, that "[i]t is likely that [PECO's] treatment of IGA and BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGC," and

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employees who are members of the IGA may elect to have the IGA process their appeal. Under this procedure, the IGA presents a written grievance at one of its periodic meetings with PECO representatives. The individual grievant is not necessarily present. Following discussion of the grievance, representatives of PECO's personnel department investigate it and the vice president issues a written answer. If the grievance is denied, the employee and his IGA representative may nonetheless choose to meet with the employee's supervisors. PECO's personnel manager mediates at this step and recommends disposition to the vice president, whose decision is final. Aggrieved employees who do not use the IGA procedures present their appeals directly to PECO personnel officials, who then conduct an investigation. PECO's vice president for personnel thereafter decides the grievance and usually presents the answer personally to the grievant. Employees who follow this non-IGA procedure are entitled to be represented or assisted by another employee of their choice, and grievants have selected BGC representatives to serve in that capacity without objection from PECO. Pet. App. A21-A23.

that "[b]y placing the name of IGA in its handbook and setting up IGA grievance procedures, [PECO] may be minimally encouraging membership in the IGA and discouraging membership in the BGC." The Board held, however, that "these factors, absent discrimination, are not violations of Section 8(a)(1) of the Act, and in no manner restrain or restrict employees from joining, forming, or assisting a labor organization or organizations with a view towards obtaining Section 9(a) status." *Id.* at A43-A44. Finding no evidence that PECO had impermissibly discriminated against any of its employees, the Board concluded that PECO "has not interfered with the rights of any of its employees to join or support the BGC" (*id.* at A41).

3. The court of appeals set aside the Board's order and remanded the case for further proceedings. The court recognized that "because the BGC has never been recognized or certified as the exclusive bargaining representative of PECO's employees, PECO has no independent obligation to listen to or recognize the BGC for purposes of its members' grievances" (Pet. App. A8). It also recognized that "the agreement with the IGA to accord its members privileged treatment for grievance purposes [wa]s not, standing by itself, unlawful under the Act" (*ibid.*). However, relying on the ALJ's finding that " '[i]t is likely that [PECO's] treatment of IGA and the BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGG,' " the court concluded, contrary to the Board, that "PECO's privileged treatment of the IGA encourages membership in that group and discourages membership in other groups, including BGC" and that therefore "PECO has interfered with and coerced employee choice in self-organization and in forming, joining, or assisting a labor organization" (*id.* at A10).

Because it found that PECO's discriminatory treatment of the BGC constitutes a prima facie violation of Section 8(a)(1), the court remanded the case to the Board "for consideration of PECO's purported business justifications, and for an appropriate remedy if no business justification exists" (Pet. App. A12).[3] The court added that it was not suggesting that "the only appropriate remedies for PECO's conduct [would be] to either dismantle the IGA grievance system or to tolerate separate grievance systems for each non-majority labor organization that requests one. Rather, a grievance system which accords all employees, and not just members of a privileged group, the leverage of group representation for individual grievances will remove the unlawful coercion on employees to either join the privileged group or forego group representation for individual grievances." *Id.* at A12-A13.

4. Petitioners contend that this case raises the issue whether an employer must treat all minority unions equally (84-1641 Pet. i, 8-9) and more particularly, whether an employer may recognize one minority union for the purpose of processing grievances without according similar privileges to all other minority unions (84-1633 Pet. i, 12). However, the court of appeals did not hold that any preference accorded by an employer to one non-majority union over another violates Section 8(a)(1), or that an employer must always treat two or more non-majority unions equally in all respects. Rather, the court was careful to explain that it was deciding only whether, "under the facts of this case, PECO interfered with, restrained, or coerced its employees in organizing, forming, joining, or assisting the BGC" (Pet. App. A8). Although the court found, contrary to the Board, that PECO's preferential treatment of the IGA in respect to

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[3]The Board had previously found it unnecessary to pass on the business justifications proffered by PECO (Pet. App. A15 n.4).

grievance processing was a significant benefit which, absent a substantial business justification, would constitute impermissible interference with the employees' exercise of their Section 7 rights, this disagreement between the court and the Board raises essentially a fact-bound issue. This Court ordinarily does not review such issues. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Moreover, the court of appeals did not finally determine whether PECO's preferential treatment of IGA violated Section 8(a)(1) of the Act, but remanded the case for the Board to evaluate, in the first instance, PECO's business justifications. The court also indicated that, even if the Board ultimately rejected PECO's business justifications, it was not required to provide remedies that would require PECO either to "dismantle the IGA grievance system or to tolerate separate grievance systems for each non-majority labor organization that requests one" (Pet. App. A12-A13).

In light of the fact-specific nature of the court of appeals' decision and the interlocutory posture of the case, the Board decided not to file a petition in this case.[4]

Respectfully submitted.

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[4]Contrary to the contention of petitioner IGA (84-1641 Pet. 14-17), the decision below does not conflict with the decision in *NLRB* v. *Post Publishing Co.*, 311 F.2d 565 (7th Cir. 1962). There, the court held that an employer's contribution of profits from cafeteria and beverage vending machine sales to a union with which it had a contract did not constitute unlawful assistance and financial support of a labor organization under Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2). Nothing in that decision bears on the question whether the privileges granted to members of one non-majority group over members of another in their relationship with their employer impinges on the Section 7 rights of employees to be free of employer pressure in organizational activities.

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